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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the	)	MM Docket No. 92-259
Cable Television Consumer	)	
Protection and Competition	)	
Act of 1992	)	
	)	
Broadcast Signal Carriage	)	
Issues	)	

TO: The Commission

OPPOSITION OF THE NATIONAL ASSOCIATION OF BROADCASTERS AND THE ASSOCIATION OF INDEPENDENT TELEVISION STATIONS, INC. TO THE PETITION OF NATIONAL CABLE TELEVISION ASSOCIATION FOR A STAY PENDING RECONSIDERATION, OR ALTERNATIVELY PENDING REVIEW

David L. Donovan
Association of Independent Television Stations, Inc.
1320 19th Street, N.W.
Washington, D.C. 20036
(202) 887-1970

Counsel for the Association of Independent Stations, Inc.

Henry L. Baumann
Jack N. Goodman
Benjamin F.P. Ivins
National Association of Broadcasters
1771 N Street, N.W.
Washington, D.C. 20036
(202) 429-5430

Bruce J. Ennis, Jr.
David W. Ogden
JENNER & BLOCK
601 13th Street, N.W.
Washington, D.C. 20005
(202) 639-6000

Counsel for the National Association of Broadcasters

May 10, 1993

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Summary

NCTA's petition for a stay pending reconsideration and/or appeal of the Commission's must carry and retransmission consent rules must be denied because of its inexcusable delay in seeking relief, and because it has failed to satisfy any of the four criteria necessary to obtain a stay.

"Equity aids the vigilant and not those who slumber on their rights." *NAACP v. NAACP Legal Defense and Education Fund, Inc.* 753 F.2d 131, 137 (D.C. Cir.), *cert denied*, 472 U.S. 1021 (1985). NCTA provides no excuse or explanation as to why it delayed almost two months after adoption of the Commission's rules, and less than a month before full must carry rights are to go into effect, before it filed its stay petition. Accordingly, any harm that might befall cable operators absent a stay is largely of NCTA's own making.

Even had NCTA timely filed its petition, it would not be entitled to the requested stay because it has failed to satisfy any of the necessary criteria. First, NCTA has failed to establish that it is likely to succeed on the merits of any of its demands that the Commission's rules be amended. Its requested amendments are largely not based on claims that the rules are contrary to the Cable Act, and rely on arguments the Commission has already considered and rejected. Nor are NCTA's requested amendments founded on arguments that the Commission's actions were arbitrary and capricious. At most, they present disagreements about matters committed to the agency's discretion where the Commission carefully considered all policy alternatives and reached a result consistent with Congressional intent.

Second, NCTA has failed to provide the requisite showing of irreparable injury. The claimed injuries that will befall cable operators if the stay is denied are precisely those considered and found wanting both by the District Court and the Supreme Court. Moreover, the purported harm that cable will suffer is either speculative and uncertain, or is the product, not of the regulatory choices NCTA seeks to change, but rather of must carry requirements generally.

Third, were a stay to be granted, the balance of hardships would fall on broadcasters and the public. Juxtaposed against NCTA's claim of inconvenience to *some* unspecified number of cable systems from *possibly* having to make multiple channel realignments, are the economic and other losses non-carried stations would suffer from the delay of enforcement of their statutorily guaranteed carriage rights, and the losses subscribers would have to continue to endure resulting from their being deprived of access to such stations' programming.

Fourth, the public interest would suffer from the grant of NCTA's requested stay. Such a stay would delay implementation of mandatory signal carriage rules which Congress concluded would advance the public interest, and would place additional and unnecessary burdens on the Commission and its staff to develop and implement an entirely new schedule.

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The National Association of Broadcasters ("NAB")[1/] and the Association of Independent Television Stations, Inc. ("INTV")[2/] submit this Opposition to the Petition of the National Cable Television Association ("NCTA") for a stay pending reconsideration and/or appeal of the Commission's rules implementing the must carry and retransmission consent provisions of the Cable Act of 1992, 47 U.S.C. §§ 325(b), 614-15. The gravity of NCTA's claimed injuries must be questioned in light of its two-month delay in asking the Commission for relief, and also because these claims

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1/ NAB is a nonprofit, incorporated association of radio and television stations and networks which serves and represents the American broadcasting industry.

2/ INTV is a nonprofit, incorporated association of local television stations not affiliated with ABC, CBS or NBC.

are virtually identical to claims NCTA raised unsuccessfully in the District Court and the Supreme Court. Further, as we will demonstrate, NCTA's petition meets none of the four standards which must be satisfied before the Commission can grant the extraordinary relief of a stay.

I. NCTA's Request Comes Too Late

As NCTA acknowledges, the Commission adopted its signal carriage rules on March 11, 1993. But NCTA inexcusably delayed for almost two full months — until May 3 — before seeking a stay. In and of itself, this delay casts substantial doubt upon the sincerity of NCTA's claims that the regulations impose significant injuries on cable operators. Indeed, NCTA's delay is particularly unreasonable given that NCTA is challenging the implementation schedule adopted by the Commission, and yet NCTA let the first implementation date go by[3/] and filed its petition on the precise date on which cable operators assumed their first affirmative obligation under the rules.[4/] NCTA's complaint that "cable operators are required to do an enormous amount of work by May 3," Petition at 9, thus rings hollow. The time to complain about these burdens was long *before* May 3 — not *on* May 3.

3/ The rules adopted by the Commission provide that *beginning April 2*, (1) operators must provide 30 days' notice before deleting or repositioning any broadcast stations, and (2) petitions to modify television markets may be filed. Sections 76.58(a), 76.59 of the Commission's Rules.

4/ On May 3, operators were required to give notice (1) to all noncommercial educational stations of the location of their principal headend; and (2) to all local stations that may not be entitled to must carry status because (a) carriage would increase the cable operator's copyright liability or (b) their signal does not meet the signal strength requirements. *Id.* §§ 76.58(b), (d).

Indeed, any "harm" that allegedly might befall NCTA absent a stay is of NCTA's own making. By also not seeking reconsideration until the last day provided for such petitions, NCTA has constrained the Commission's ability to resolve the matters raised by NCTA before the major implementation dates. Had NCTA made a prompt filing, there would have been no such constraint. Any minor modifications that the Commission might have deemed advisable could have been implemented without delaying the effective dates of an Act of Congress. For these reasons, the equitable relief NCTA seeks should not be granted. *See Program Exclusivity*, 4 FCC Rcd. 6476, 6478 n. 4 (1989)(delay in filing stay request militates against a grant of the request). As the D.C. Circuit has made clear, "equity aids the vigilant and not those who slumber on their rights." *NAACP v. NAACP Legal Defense and Educational Fund, Inc.*, 753 F.2d 131, 137 (D.C. Cir.), *cert. denied*, 472 U.S. 1021 (1985).

II. NCTA Is Not Likely to Succeed on the Merits

NCTA's stay request should also be denied because it utterly fails to establish that it is likely to succeed on the merits of any of its demands that the Commission's rules be amended.[5/] NCTA does not argue that most of the Commission's rules it

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[5/] Indeed, NCTA only argues that it has raised "serious questions on the merits" of these issues, NCTA Petition at 5, and claims that is a sufficient showing to justify a stay if the other three requirements specified in *Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977), strongly support issuance of a stay. Even if NCTA could demonstrate that its reconsideration request presents "serious questions" going to the merits of the FCC's rules, which it cannot, we demonstrate *infra* that NCTA's petition meets *none* of the other three factors — irreparable injury in the

(continued...)

objects to are contrary to the Cable Act.[6/] It raises for the most part a series of often trivial objections to the implementation schedule adopted by the Commission, and suggests that reconsideration would be moot if the rules are not stayed.[7/]

That cable systems may be required to take certain actions before the Commission can act on NCTA's request for reconsideration is not a ground for issuance of a stay. Section 1.1429(k) of the Commission's rules establishes that the filing of a petition for reconsideration shall not "operate in any manner to stay or postpone the enforcement" of a Commission decision. *See Paxton Community Antenna System, Inc.*, 52 FCC 2d 568, 569 (1975).

Submission of new or additional information demonstrating that the initial decision was incorrect is required in order to demonstrate that a petition for reconsideration is likely to succeed on the merits. *Reese Broadcasting Corp.*, 1 RR 2d 653 (1963). As we will explain below, NCTA's contentions were fully raised and dealt with in the rulemaking proceedings leading to the adoption of the Commission's rules.

If NCTA instead contends that it has a likelihood of success on the merits of an appeal from a Commission decision denying reconsideration, that argument also fails. It is well-established that a decision of an agency adopting rules in furtherance of its statutory mandate will be affirmed unless the decision is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 553; *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 41 (1983). "The scope of review under [that] standard is narrow, and a court is not to substitute its judgment for that of the agency." *Id.* at 43. The Commission's decision adopting must carry and retransmission consent rules will be upheld if the Commission has considered the policy alternatives committed to its discretion and articulated reasons for the choices it made. *See United Video v. FCC*, 890 F.2d 1173, 1182 (D.C. Cir. 1989). Applying these standards in *Program Exclusivity*, 4 FCC Rcd. 6476, 6477 (1989), the Commission recognized that where it had considered and rejected the arguments raised in a stay request, those parties "have neither made a strong showing that they are likely to prevail on appeal nor a substantial case on the merits."

An examination of NCTA's specific requests for reconsideration shows that its claims do not even present a colorable claim that the Commission's actions were arbitrary and capricious. They present at most disagreements about matters committed to the agency's discretion where the Commission carefully considered all policy alternatives and reached a result consistent with Congressional intent.

A. NCTA's Arguments Implementation Schedule Arguments Have Been Made and Rejected

NCTA's primary argument is that the implementation schedule adopted by the Commission imposes unwarranted burdens on cable interests by creating the potential for several changes in cable system channel line-ups between now and October. The remedy NCTA suggests is to delay all must carry obligations until October 6 and implement must carry and retransmission consent simultaneously.

This precise relief was sought by NCTA and others in comments on the *Notice of Proposed Rule Making*.[8/] The Commission explicitly noted this contention and rejected it, stating, "we believe that Congressional intent precludes us from simply delaying implementation of must-carry until October 6, 1993." *Implementation of the Cable Act of 1992: Broadcast Signal Carriage Issues*, FCC 93-144 (rel. March 29, 1993) at ¶ 153 [hereinafter *Must Carry Rules*]; *see id.* ¶ 155 n. 410. NCTA proffers no new reason for believing that conclusion was in error. Instead, it argues that the Commission was required only to *issue* must carry regulations within 180 days of enactment of the Cable Act, and was not required to make those rules effective by any date. Even if this argument could be accepted,[9/] NCTA points to no reason why

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8/ *See* NCTA Petition for Reconsideration, MM Dkt. No. 92-259 (filed May 3, 1993) at 4; Comments of NCTA, MM Dkt. No. 92-259 (filed Jan. 4, 1993) at 29-30; Comments of Time Warner Entertainment Co., L.P., MM Dkt. No. 92-259 (filed Jan. 4, 1993) at 43-44.

9/ The Senate Report states that "each television station *which has carriage and channel positioning rights* . . . will make an election between those rights and the right to grant retransmission authority," indicating that stations will have must carry rights before they are required to choose between those rights and

(continued...)

the Act bars the Commission from making must carry effective before retransmission consent.[10/]

Moreover, the Commission took note of concerns about potential disruption from repeated changes to channel line-ups. To minimize changes to cable systems, the Commission deferred implementation of the channel positioning requirements for must carry stations until October 6. In the interim, a cable operator may place added must carry signals "anywhere on its channel line-up." *Must Carry Rules* ¶ 154. Thus, the Commission has already addressed the very concerns that NCTA advances.

While NCTA argues that cable operators and programmers may be inconvenienced by requiring compliance with must carry before retransmission consent elections and negotiations, the Commission reasonably concluded that putting off determination of stations' must carry status until October would make the choice between must carry and retransmission consent and subsequent retransmission consent

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[9/](...continued)
retransmission consent. S. REP. NO. 92, 102d Cong., 1st Sess. 38 (1991)(emphasis added); *see id.* at 87 (FCC required to "issue regulations *implementing* the requirements imposed by this new section 614 within 180 days after enactment)(emphasis added).

[10/] Indeed, NCTA's interpretation of the Act would invalidate the Commission's requirement, adopted at the behest of NCTA, that broadcasters choose between must carry and retransmission consent well in advance of the effective date of the Cable Act's retransmission consent amendments. Section 325(b)(3)(B) of the Act states that the Commission's retransmission consent regulations shall require stations to make their election "within one year after the date of enactment." Applying NCTA's reasoning, the Commission could not require broadcasters to make that election any earlier than October 5, 1993, one year after enactment.

negotiations much more difficult.[11/] Under the schedule adopted by the Commission, stations whose must carry status may be in doubt will know of these problems well in advance of the required election date and have an opportunity to resolve them before choosing their carriage status. Similarly, once stations make their elections, the Commission provided for a substantial negotiation period for retransmission agreements.

While NCTA contends that the Commission's implementation schedule imposed unreasonably short deadlines upon cable systems, must carry obligations and their specifics could not have come as a surprise to cable operators. On May 14, 1991, the Senate Commerce Committee reported out a bill including must carry provisions substantially similar to those implemented by the Commission. Congress passed the Cable Act on October 5, 1992, and the Commission proposed implementing regulations in December 1992. Nothing in the Commission's rules relating to the choice of must carry signals or the conditions for must carry status is materially different from the specific requirements stated in the Act or in the Commission's December proposal. Cable operators, therefore, have had many months to prepare to put must carry into place. If they chose instead to hope that the Act would be declared unconstitutional or that the Commission would disregard Congress' mandate, any resulting problems are of cable operators' own creation and the Commission's

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11/ This would exacerbate the concerns NCTA has expressed about uncertain channel line-ups resulting from protracted retransmission consent negotiations.

adoption of an otherwise reasonable implementation schedule is not arbitrary and capricious.[12/]

B. NCTA's Arguments Concerning Substantial Duplication Lack Merit

NCTA's second argument concerns the relationship between the must carry rules and the Commission's syndicated exclusivity and network non-duplication rules. NCTA argues that the Commission should change the definition of "substantial duplication" in the must carry rules so as to deem any station carrying even one

anticipated that there may be situations where a cable operator is required to carry a station, but some of the programming on that station may have to be "blacked out" by operation of the program exclusivity rules. *Id.* ¶¶ 54, 170.[13/]

NCTA does not attempt to explain how its proposed rule could be reconciled with this provision and the explicit legislative history that supports it. *See* H. REP. No. 628, 102d Cong., 2d Sess. 93 (1992). Whether or not the Commission might have been able to fashion a rule limiting the must carry rights of stations which are subject to the program exclusivity rules, it cannot be argued that its failure to do so was arbitrary and capricious.[14/]

C. The Commission's Determination That Certain Protections Apply to Retransmission Consent Signals Was Not Arbitrary and Capricious

NCTA's third argument is that the Commission incorrectly determined that certain provisions of section 614 will apply to signals carried pursuant to retransmission consent. Petition at 13-14. It claims that the Commission's decision is contrary to Congressional intent and "puts a thumb on the scale on the side of broadcasters."

13/ NCTA is simply wrong in asserting that requiring carriage of stations subject to program exclusivity "blackouts" in effect requires carriage of duplicating stations. The portions of the signal that cable systems will carry are not duplicative, and cable operators are free to substitute other programming on a copyright-free basis from different broadcast signals to fill in any "holes."

14/ NCTA makes no effort to quantify the number of instances where carriage will be required of signals which carry programming that must be deleted. It also fails to consider the fact that in most situations where must carry signals might be theoretically subject to other stations' exclusivity rights, those rights could not be enforced due to the stations' viewing patterns, or the cable system could request modification of the relevant television markets to eliminate the problem. *See* Reply Comments of NAB, MM Dkt. No. 92-259 (filed Jan. 19, 1993) at 25 n. 28.

NCTA ignores the Commission's conclusion that the "legislative history of Section 614 appears to indicate that Congress did not intend for cable operators to carry partial broadcast signals." *Must Carry Rules* ¶ 166; *see* Comments of NAB, MM Dkt. No. 92-259 (filed Jan. 4, 1993) at 45-49. The Commission carefully distinguished between provisions of section 614 that were explicitly addressed to the carriage of must carry signals, and other provisions that were addressed to carriage of television stations generally. Since that directly follows the direction in the relevant legislative history,[15/] the Commission's adoption of that view was not arbitrary or capricious.

III. NCTA Fails to Demonstrate Irreparable Injury

A. NCTA Raised the Same Claims of Injury in Its Unsuccessful Efforts to Persuade the District Court and the Supreme Court to Enjoin Enforcement of the Act and Regulations

This is the third time NCTA has advance precisely the same claims of injury in an effort to block implementation of must carry requirements. In both the District Court and the Supreme Court, NCTA sought to block not only the Act itself, but also the Commission's implementing regulations.[16/] There too, NCTA argued that if

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15/ "Section 325 makes clear that a station electing to exercise retransmission consent . . . will thereby give up its rights *to signal carriage and channel positioning* established under section 614." S. REP. NO. 92, 102d Cong., 1st Sess. 37 (1991)(emphasis added); *see* H.R. REP. NO. 862, 102d Cong., 2d Sess. 76 (1992).

16/ *See* Application for an Injunction Pending Appeal at 20, *Turner Broadcasting System v. FCC*, No. A-798 (U.S. April 19, 1993)[hereinafter *App.*]("applicants request that the Court restrain the defendants from enforcing against any cable system any signal-carriage or channel-positioning obligations pursuant to § 4

(continued...)

enforcement of the regulations were not stayed, operators might be compelled to change carriage line-ups or channel positions two or three times, and would then have to "unscramble the omelette" if they ultimately prevailed.[17/] There too, NCTA argued that operators would have to install sophisticated equipment, rearrange their "tiering," and purchase expensive traps.[18/] There too (in complete disregard of explicit Congressional findings to the contrary), NCTA argued that staying implementation of the Act would not harm broadcast stations because broadcasters could allegedly reach cable subscribers over the air.[19/] These shopworn arguments did not prevail in the District Court or the Supreme Court, and have not become more persuasive through repetition. They should be rejected again.

B. NCTA's Claims of Harm Are Speculative and Uncertain

Most of NCTA's claims of harm are the product, not of the regulatory choices it seeks to change on reconsideration, but instead of must carry requirements generally. That cable operators may have to carry some broadcast signals they would otherwise choose not to carry is the necessary result of implementing the requirements of the Cable Act. Any incremental inconvenience to cable operators resulting from

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[16/](...continued)
or § 5 of the 1992 Cable Act *or the regulations promulgated thereunder*") (emphasis added).

[17/] *Compare App.* at 19 & n. 25 *with* Petition at 15.

[18/] *Compare App.* at 17 n. 21, 18, 19 *and Joint Motion for Injunction Pending*

one choice in adopting rules or another is *de minimis*. Moreover, while NCTA views the possibility of being required to change channel line-ups as proof of harm, the order it asks the Commission to enter would leave cable systems free to reposition broadcast stations while the stay is in effect.[20/]

NCTA's claims of harm, moreover, are speculative and contradictory. Claims of irreparable injury used to support a stay must not be speculative; the claimed injury must be "certain and great . . . actual and not theoretical," and the stay request must demonstrate that the "harm will *in fact* occur." *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985)(emphasis in original); *Program Exclusivity*, 4 FCC Rcd. at 6477. On the one hand, NCTA claims that "by June 2 1993, the significant number of operators with limited channel capacity — serving most cable subscribers — will be required to add broadcast signals and drop existing services." Petition at 8.[21/] On the other hand, they admit that "the vast majority of local broadcast stations are carried now by cable operators." Petition at 15. If that is true, the likelihood of substantial injury to cable operators from having to add certain signals on June 2 is

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20/ Further, as discussed *supra* n. 12, difficulties in implementing the must carry rules by June 2 are in large part due to cable operators' improper claims of signal quality and copyright problems with must carry stations. The Commission should not even consider taking action to relieve parties of difficulties which are largely of their own making.

21/ This statement, which includes no attempt to document the number of cable systems which will have to make changes on June 2, appears to contradict the assertion of NCTA and other cable interests to the Supreme Court that only about 2,000 (out of 11,000) cable systems "currently have no excess channel capacity." *App.* at 17.

remote, particularly since even NCTA does not contend that cable operators would not ultimately have to carry such signals.

NCTA's further complaint that cable systems may have to begin carrying certain signals in June that they could drop in October if the stations involved choose retransmission consent and subsequently fail to reach a carriage agreement with the cable operator is equally speculative. First, stations which have not been voluntarily carried by a cable system are unlikely to give up their carriage rights by electing retransmission consent. Those stations, therefore, will probably choose to retain their must carry rights.[22/] The supposition that there will be a widespread failure to reach carriage agreements is entirely unwarranted, given the fact that the Act recognizes that carriage of broadcast signals on cable systems benefits both broadcasters and cable operators. NCTA, therefore, has not demonstrated the *certainty* of irreparable injury required for the extraordinary relief it seeks.

IV. The Balance of Hardships From a Stay Falls on Broadcasters and the Public

NCTA gives short shrift to the requirement that it show that the hardships from denial of a stay would be greater than the hardships that would result if a stay

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22/

were granted. It argues only that most stations are now carried, and little harm could come from making others wait for carriage. Petition at 15-16.

But NCTA's claims of injury are minimal. Before the Commission, NCTA cannot rely on any claims of harm to cable operators' First Amendment interests from having to carry certain stations, because those claims are exclusively before the courts and were rejected by the District Court and the Supreme Court. The mere inconvenience to *some* unspecified number of cable systems from *possibly* having to make more than one adjustment to their channel line-ups this year cannot justify the relief NCTA seeks..

By contrast, a stay would result in the loss of statutorily guaranteed carriage rights for a number of television stations. The courts have recognized that interference with rights protected by statute constitutes irreparable injury. *See New Motor Vehicle Board v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977)(Rehnquist, J., in chambers); *Oil, Chemical & Atomic Workers International Union v. AMOCO Oil Co.*, 885 F.2d 697, 707 (10th Cir. 1989); *Hold v. Continental Group, Inc.*, 708 F.2d 87, 91 (2d Cir. 1983). Moreover, the loss of the right to communicate with cable subscribers may result in debilitating financial harm. Congress found in section 2(a)(16) of the Cable Act that lack of carriage threatened "the economic viability of free local broadcast television." The affidavits of several station operators attesting to the continued damage their stations suffer from lack of carriage are attached to this Opposition. Delay in implementing must carry rules may prove fatal to these and other stations.

Further, during the period of a stay, cable subscribers will be deprived of access to the programming provided by stations that are not now being carried, reducing the diversity of local views available to them. The reduced revenues of stations excluded from cable carriage will also adversely affect the ability of those stations to provide quality programming for viewers receiving them over the air.

The balance of hardships, therefore, militates against a stay of the Commission's carriage rules.

V. The Public Interest Would Not be Served by a Stay

The public interest favors denial of a stay. The only specific factor which NCTA cites as indicating that a stay would serve the public interest is the avoidance of subscriber confusion. The Commission took careful steps to adopt a schedule which would minimize disruption to consumers, and NCTA offers no credible argument that whatever limited additional changes may have to be made in cable systems' program offerings due to implementing must carry rules in June would have a significant impact on the public interest.

To the contrary, the public interest would suffer if a stay were granted. Congress definitively concluded in the Cable Act that mandatory signal carriage rules would advance the public interest. Delaying their going into effect *ipso facto* would disserve those interests. In addition, the stay sought by NCTA would disrupt the entire schedule adopted by the Commission for implementing the Cable Act, placing additional burdens on the Commission and its staff in developing a new schedule when the stay expires and in dealing with complaints then and during the stay period.

See Memorandum of Federal Respondents in Opposition to an Injunction Pending Appeal at 26-30, *Turner Broadcasting System v. FCC*, No. A-798 (U.S. April 26, 1993).[23/] The public interest, therefore, does not support staying the must carry rules.

Conclusion

For the foregoing reasons, the Commission should deny NCTA's requested stay.

Respectfully submitted,

David L. Donovan
Association of Independent
Television Stations, Inc.
1320 19th Street, N.W.
Washington, D.C. 20036
(202) 887-1970

Counsel for the Association of Independent Stations, Inc.

Henry L. Baumann
Jack N. Goodman
Benjamin F.P. Ivins
National Association of
Broadcasters
1771 N Street, N.W.
Washington, D.C. 20036
(202) 429-5430

Bruce J. Ennis, Jr.
David W. Ogden
Ann M. Kappler
JENNER & BLOCK
601 13th Street, N.W.
Washington, D.C. 20005
(202) 639-6000

Counsel for the National Association of Broadcasters

May 10, 1993

23/ Indeed, the stay requested is hardly self-enforcing and would significantly burden the Commission's limited resources. As noted above, NCTA commits only to continued carriage of must carry stations presently on cable systems; it makes no promise that these stations will not be repositioned. Further, NCTA does not indicate how the stations eligible for carriage during the stay will be determined. Would stations now carried by a cable system as distant signals continue to have carriage rights? Similarly, if a cable system claims that a station does not provide it with an adequate signal, would it have the right to

ATTACHMENTS

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

NO. A-798

TURNER BROADCASTING SYSTEM, INC., *et al.*

Appellants

v.

FEDERAL COMMUNICATIONS COMMISSION *et al.*

Appellees

DECLARATION OF DANIEL G. SLAPE

STATE OF PENNSYLVANIA ss:

DANIEL G. SLAPE makes this affidavit and states:

1. I submit this statement in support of the Opposition to Application for an Injunction Pending Appeal of Appellee Association of Independent Television Stations, Inc. ("INTV"). The information contained in this statement is based on my personal knowledge.

Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 102 Stat. ___, *to be codified at* 47 U.S.C. §614 ("the Act"), would not become effective with respect to cable systems which neither drop nor shift the channel position of any broadcast station pending the Court's decision on the constitutionality of the must carry requirement. The practical effect of such an order would freeze carriage of stations now carried on cable systems, but not require carriage of stations that are not now carried by the cable systems which neither drop nor shift the channel position of any broadcast station pending the Court's decision.

4. WTGI-TV currently is not carried by 27 cable systems located in the Philadelphia ADI ("Area of Dominant Influence"), the area in which WTGI-TV may request carriage as a local "must carry" station under Section 614. These systems serve 1,084,540 subscribers, which represent 40.8% percent of the television households in the ADI. WTGI-TV is a local commercial television station with respect to each of these cable systems under Section 614 (h)(1) of the Act, and WTGI will assert carriage rights under Section 614 with respect to each of these cable

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OCTOBER TERM, 1992

NO. _____

TURNER BROADCASTING SYSTEM, INC., *et al.*

Appellants

v.

FEDERAL COMMUNICATIONS COMMISSION *et al.*

Appellees

DECLARATION OF LON MIROLLI

STATE OF NEW HAMPSHIRE ss:

LON MIROLLI makes this affidavit and states:

1. I submit this statement in support of the Opposition to Application for an Injunction Pending Appeal of Appellee Association of Independent Television Stations, Inc.("INTV") The information contained in this statement is based on my personal knowledge.

2. I am General Manager of WGOT-TV, New Hampshire.

3. I understand that the appellants in this case have asked the court to issue an order under which the "must carry" requirements embodied in Section 4 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 102 Stat. ___ , *to be codified at* 47 U.S.C. §614 ("the Act"), would not become effective with respect to cable systems